Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 142, and EUSEBIO LAPENIA, JR.,
Petitioners,

v.

NICANOR E. CASUMPANG, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

HERBERT R. TAKAHASHI
REBECCA L. COVERT
TAKAHASHI, MASUI & VASCONCELLOS
547 Halekauwila Street, Room 206
Honolulu, Hawaii 96813
(808) 526-3003

FRED H. ALTSHULER *
LAURA P. JURAN
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, California 94108
(415) 421-7151

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

When a union member has chosen not to comply with fair and reasonable procedural rules for pursuing internal union remedies before bringing a court action under Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(4), should the district court dismiss the union member's lawsuit *without prejudice* and permit the member a second opportunity to exhaust those remedies and return to court?

LIST OF PARTIES TO THE PROCEEDINGS

The Petitioners in this case are International Longshore & Warehouse Union, Local 142 ("Local 142" or "Union"), and Eusebio Lapenia, Jr., the president of Local 142. The Respondent is Nicanor E. Casumpang, Jr.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Amalgamated Clothing Workers of America Rank and File Committee v. Amalgamated Clothing Workers of Am., Philadelphia, Joint Bd., 473 F.2d 1303 (3d Cir. 1973) 11

Causey v. Local 1323, United Auto., Aerospace and Agric. Implement Workers of Am., UAW, 734 F. Supp. 1201 (D. S.C. 1989) 11

Clayton v. International Union, United Auto., Aerospace and Agric. Implement Workers of Am., 451 U.S. 679 (1981) ..... *passim*

Donovan v. Local 1235, Int'l Longshoremen's Ass'n, AFL-CIO, 715 F.2d 70 (3d Cir. 1983) 12

Gesink v. Grand Lodge, Int'l Ass'n of Machinists and Aerospace Workers, Dist. Lodge 86, 831 F.2d 214 (10th Cir. 1987) 10

Hayes v. Brotherhood of Ry. and Airline Clerks/Allied Services Div., 727 F.2d 1383 (5th Cir. 1984), *cert. denied*, 469 U.S. 935 (1984) 11

Hodgson v. Local Union 6799, United Steelworkers of Am., AFL-CIO, 403 U.S. 333 (1971) 7, 13

Keiper v. United Auto. Workers' Union, Local 677, 867 F. Supp. 298 (E.D. Pa. 1994) 11

Local 323 v. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, 160 F. Supp.2d 500 (W.D. N.Y. 2001) 11

Monroe v. International Union, UAW, 723 F.2d 22 (6th Cir. 1983) 7, 11

Stevens v. Northwest Ind. Dist. Council, United Bhd. of Carpenters, 20 F.3d 720 (7th Cir. 1994) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Wagner v. General Dynamics, 905 F.2d 126 (6th Cir. 1990)	10
Wiglesworth v. Teamsters Local Union No. 592, 552 F.2d 1027 (4th Cir. 1976), *cert. denied*, 431 U.S. 955 (1977)	7
Wozniak v. International Union, United Auto., Aerospace and Agric. Implement Workers of America–UAW, Local 897, 842 F.2d 633 (2d Cir. 1988)	10
STATUTES	
28 U.S.C. § 1254(1)	2
29 U.S.C. § 185	8
§ 411(a)	2, 4, 8, 10
§§ 481-483	12

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PETITION FOR A WRIT OF CERTIORARI

Petitioners International Longshore & Warehouse Union, Local 142, and Eusebio Lapenia, Jr. (collectively "Local 142" or "Union"), the defendants in the district court and the appellees in the court of appeals, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Casumpang v. International Longshore & Warehouse Union, Local 142*, 9th Cir. No. 99-16674, entered on October 23, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 269 F.3d 1042 (9th Cir. 2001), and is included herein as Appendix A. The opinion of the United States District Court for the District of Hawaii is unreported and appears as Appendix B.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered a judgment and opinion in this case on October 23, 2001. The Ninth Circuit issued an order denying a petition for rehearing on December 5, 2001 (the order denying rehearing is included as Appendix C). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 411(a)(4) of Title 29 of the United States Code provides in pertinent part:

> No labor organization shall limit the right of any member thereof to institute an action in any court, . . . *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof . . . .

29 U.S.C. § 411(a)(4).

STATEMENT OF THE CASE

1. *Relevant Facts.* In 1996, Nicanor Casumpang, Jr. was charged with violating Local 142's constitution by working as an electrical contractor while he was employed full-time as a Union Business Agent. In proceedings before a Union trial committee, Casumpang stipulated that he had committed this constitutional violation, and he agreed to cease and desist from engaging in future work as an electrical contractor while serving as Business Agent (unless, in accordance with the constitution, he obtained the Union's authorization to do so). App. 3a.

On January 7, 1998, thirteen Union members signed written charges against Casumpang, alleging he had continued to work as an electrical contractor in violation of the Union's

constitution and the 1996 cease-and-desist order. App. 6a. The members' charges were referred to the Union's Judicial Panel, which conducted a hearing on January 16, 1998. The Judicial Panel found that Casumpang had persisted in violating the constitution and the cease-and-desist order; it therefore suspended him as a member in good standing and declared him ineligible to serve as a Union officer during his suspension. App. 6a-7a. In a written decision, the Judicial Panel advised Casumpang of both his right to appeal to the Local Executive Board and his obligation to exhaust internal union remedies. App. 7a.

Casumpang filed an appeal with the Local Executive Board. App. 7a-8a, 42a. In a decision dated March 19, 1998, the Local Executive Board upheld the Judicial Panel's determination and advised Casumpang of the next step in the Union's appeals process: he was required to file a timely appeal to the local membership in accordance with Article 27.10.5 of the Union constitution. That provision allows a member to appear personally at unit membership meetings and submit his or her appeal to a vote of the total membership of the Union. App. 8a-9a, n.3.

Casumpang did *not* heed the Local Executive Board's advice to take his case to the local membership. Instead, he sought relief directly from the President of the International Union. App. 8a, 42a. While the International President found Casumpang's claims lacking in merit, the President denied his appeal because Casumpang had failed to appeal to the local membership, as required by Local 142's constitution, before seeking recourse with the International. App. 8a-9a, 43a. Thereafter, on August 25, 1998, Casumpang sent a letter to Local 142, belatedly attempting to resume use of the Union's internal review process and appeal his case to the local membership. Local 142's President informed Casumpang that the Local Executive Board's decision had

by then been submitted to the local membership and that his request to appeal to the members was untimely. App. 9a-10a; CR 10, Ex. 60.

2. *District Court Proceedings.* Casumpang brought suit in district court on September 23, 1998, alleging that Local 142 and its President had removed him from his elected Business Agent position and suspended his membership in violation of Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA"). *See* 29 U.S.C. §§ 411(a)(1) and (2). The Union moved to dismiss his first amended complaint on jurisdictional grounds, arguing that because he was challenging a candidate eligibility determination in connection with an already-conducted election, his claim was governed exclusively by Title IV of the LMRDA. App. 16a, 18a-19a, 43a. In an effort to avoid the Title IV exclusivity problem, Casumpang filed a second amended complaint, in which he deleted the allegation that the defendants had removed him from an elected position and added allegations that he had criticized the leadership of Local 142 on a number of occasions while he was Business Agent. App. 15a, 43a.

Despite Casumpang's attempt to style his claim as one arising under Title I, the district court granted the Union's motion to dismiss. The court found that Casumpang's claim arose under Title IV of the LMRDA, and, even if it could be construed as a Title I claim, it was subject to dismissal because Casumpang had inexcusably failed to exhaust internal union remedies before going to court. App. 52a-55a.

3. *Ninth Circuit Proceedings.* The Ninth Circuit confronted two main issues on appeal: 1) whether Casumpang's claim fell exclusively within Title IV of the LMRDA; and 2) if his claim could be brought independently under Title I of the LMRDA, whether it was proper to dismiss the claim for failure to exhaust internal union remedies. Regarding the first issue—the interplay between Title I and Title IV of the LMRDA—the Ninth Circuit held that Casumpang's claim did

not fall within the exclusivity provision of Title IV. *See* App. 23a-27a. Although the Union respectfully disagrees with the Ninth Circuit's resolution of the Title IV preemption issue, that issue is not raised here.

With respect to the second issue—the failure to exhaust internal union remedies before filing a Title I lawsuit—the Ninth Circuit concluded that the district court erred by considering only one of the three factors discussed in *Clayton v. International Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 451 U.S. 679 (1981), in determining whether the Union's internal remedies were fair and adequate. *See* App. 34a-36a. The Ninth Circuit remanded the case and instructed the district court to consider all three *Clayton* factors in determining whether Casumpang's failure to exhaust the Union's hearing procedures should be excused. App. 36a-37a. Notwithstanding the fact that Casumpang had procedurally defaulted on his union appeals by failing to file a timely appeal to the local membership, the Ninth Circuit stated, "Should the district court determine that the *Clayton* requirements are met, *it may dismiss Casumpang's claim without prejudice and require Casumpang to pursue internal union remedies for a period of time not to exceed four months*." App. 37a (emphasis added).[1] Thus, under the Ninth Circuit's mandate, if the district court concludes that the internal Union remedies were fair and adequate under *Clayton* and that Casumpang was therefore not excused from exhausting them, rather than foreclosing judicial review, the court is supposed to turn the clock back to 1998 and give him a second opportunity to pursue internal union appeals in a

[1] Local 142 filed a petition for rehearing and suggestion for rehearing en banc, arguing that this portion of the Ninth Circuit's decision was erroneous and contrary to prior law. The Ninth Circuit denied the petition for rehearing on December 5, 2001. App. 56a.

timely and proper fashion. Then, if those appeals do not yield satisfactory results for Casumpang, he may return to court a second time.

REASONS FOR GRANTING THE WRIT

Introduction

This case presents the Court with an opportunity to resolve a direct inter-circuit conflict about how a district court should dispose of a case when a plaintiff failed to exhaust fair and adequate internal union remedies before filing suit. Contrary to decisions issued by every other circuit that has considered the issue, the Ninth Circuit ruled that when a union member has chosen not to comply with a union's reasonable hearing procedures before proceeding to court, the court should dismiss the member's lawsuit *without* prejudice and permit him to exhaust those defaulted remedies (and perhaps return to court) a second time. App. 36a-37a.

The Seventh Circuit reached the opposite conclusion in *Stevens v. Northwest Ind. Dist. Council, United Bhd. of Carpenters*, 20 F.3d 720, 733 (7th Cir. 1994). There, the Seventh Circuit squarely held that when a union member has failed to comply with reasonable procedural rules for pursuing internal union remedies, the member is foreclosed from obtaining judicial relief. *Id.* at 733. The *Stevens* court correctly reasoned that "to allow union members to circumvent their union's grievance-filing timetable and proceed to court unobstructed by the default would drain the exhaustion requirement of its beneficial effects." *Id.* The Ninth Circuit's *Casumpang* decision, by contrast, eviscerates the incentive for union members to pursue internal union remedies before initiating court action and renders the union's reasonable dispute resolution procedures meaningless.

The requirement that a union member exhaust reasonable union hearing procedures before seeking recourse in court is a

bedrock principle of federal labor law, which is designed to foster responsible union self-governance and the private and swift resolution of labor disputes. The Ninth Circuit's decision contravenes these policy goals and cannot be reconciled with the law in other circuits. The question presented is particularly significant because the Ninth Circuit's treatment of the effect of a failure to follow internal union procedures applies beyond the LMRDA Title I context to various other claims arising under federal labor law. This case presents a discrete issue of considerable import, and the Court should grant certiorari to establish a uniform rule regarding the availability of judicial review after a union member has failed to comply with a union's reasonable and adequate internal hearing procedures.

Discussion

Union members generally are required to exhaust internal union remedies before filing suit. *See, e.g., Clayton*, 451 U.S. at 689-92; *Monroe v. International Union, UAW*, 723 F.2d 22, 24 (6th Cir. 1983). This requirement is based on the public policy of promoting union self-regulation and the private resolution of labor disputes. *See Clayton*, 451 U.S. at 692; *Hodgson v. Local Union 6799, United Steelworkers of Am., AFL-CIO*, 403 U.S. 333, 339-40 (1971). The exhaustion doctrine serves other labor policy objectives as well: it affords unions an opportunity to resolve disputes expeditiously in the first instance; obviates the need for excessive court involvement in labor disputes; engenders robust and democratic union processes; and enables unions to develop expertise in administering their own governing documents. *See Hodgson*, 403 U.S. at 340 (exhaustion requirement strengthens union self-government and "preserve[s] the vitality of internal union mechanisms for resolving . . . disputes"); *Stevens*, 20 F.3d at 730-32 (discussing important purposes of exhaustion requirement); *Wiglesworth v. Teamsters Local Union No. 592*, 552 F.2d 1027, 1029-31 (4th Cir. 1976), *cert. denied*, 431 U.S. 955 (1977) (same).

While the exhaustion requirement is well-entrenched in federal common law (*see Clayton*, 451 U.S. at 686), Congress explicitly incorporated a statutory preference for exhaustion in Title I of the LMRDA. Section 101(a)(4) of the LMRDA provides that a member "may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) . . . , before instituting legal . . . proceedings" against the union. 29 U.S.C. § 411(a)(4).

Many, if not most, unions provide "reasonable hearing procedures" for processing complaints and require members to use those procedures before filing suit in court. As long as the timetable for exercising internal appeals is reasonable, a union member must adhere to it, or risk procedurally defaulting on his or her internal remedies. *See Stevens*, 20 F.3d at 733. By not pursuing formal union remedies in a timely or proper fashion, a union member "fails to exhaust" those remedies within the meaning of the exhaustion doctrine. *Id.* at 732.

In *Clayton*, this Court held that a district court has discretion to "excuse" a union member's failure to exhaust internal union remedies if: 1) union officials are so hostile that the individual could not hope to obtain a fair hearing on the claim; 2) the internal appeals procedure would be inadequate to provide the relief being sought; or 3) exhaustion would unreasonably delay the individual's opportunity to obtain a judicial hearing on the merits. *Clayton*, 451 U.S. at 689. Although *Clayton* involved claims for breach of a union's duty of fair representation and breach of a collective bargaining agreement (under § 301 of the Labor Management Relations Act ("LMRA") (29 U.S.C. § 185)), the *Clayton* factors have often been applied to the exhaustion analysis under Title I of the LMRDA. *See* App. 35a; *Stevens*, 20 F.3d at 733, n.31.

The Ninth Circuit ordered the district court to determine whether Local 142's internal remedies were fair and adequate

under *Clayton*. App. 36a-37a. Then, in a sharp divergence from prior case law, the Ninth Circuit held that it was error to foreclose judicial review of Casumpang's unexhausted Title I claim by dismissing that claim "with prejudice." App. 37a. On remand, if the Union's remedies are found to have been fair and adequate under *Clayton*, the district court should "dismiss Casumpang's claim *without prejudice* and require Casumpang to pursue internal union remedies" for another four months—even though the union's internal avenues for relief have long been closed due to his failure to pursue them properly in the first place. *Id.* (emphasis added). According to the Ninth Circuit's mandate, if the district court determines that the Union's internal remedies that Respondent failed to pursue were fully adequate, it must nevertheless ignore Respondent's choice to bypass those remedies and afford him yet further opportunities to use the Union's appeals process and subsequently seek relief from the court. *See id.*

Other circuits hold directly to the contrary. In *Stevens*, for example, the plaintiffs failed to exhaust internal union remedies by initiating their formal protest in an untimely manner and by neglecting to appeal the denial of their grievance through all the internal steps enumerated in their union's constitution. *Stevens*, 20 F.3d at 732. Their failure to exhaust was inexcusable, and could not be remedied because the time limit for appealing to the General Executive Board had passed. *Id.* at 733. The Seventh Circuit concluded that under such circumstances, judicial review is completely foreclosed. *Id.* Although a court may stay its hand when exhaustion is capable of completion, exhaustion could never be completed in the case "because of the nature of the [plaintiffs'] default." *Id.*[2] The Seventh Circuit thus

[2] The *Stevens* court addressed the exhaustion requirement in the context of § 301 of the LMRA, but the same analysis applies to Title I of the LMRDA with respect to the effect of a procedural default on the availability of judicial review. *See Stevens*, 20 F.3d at 733, n.31.

recognized in *Stevens* what the Ninth Circuit misapprehended in *Casumpang*: it is appropriate for a court to "stay its hand" while a union member completes the internal appeals process *only when* the union member has not already procedurally defaulted on those appeals.[3]

The Second Circuit and the Tenth Circuit clearly share the Seventh Circuit's view that judicial review is foreclosed as a result of an inexcusable and irremediable failure to exhaust internal union procedures. *See Wozniak v. International Union, United Auto., Aerospace and Agric. Implement Workers of America–UAW, Local 897*, 842 F.2d 633, 636 (2d Cir. 1988) (failure to appeal to International Executive Board in proper fashion barred lawsuit); *Gesink v. Grand Lodge, Int'l Ass'n of Machinists and Aerospace Workers, Dist. Lodge 86*, 831 F.2d 214, 217 (10th Cir. 1987) (district court

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The difference between exhaustion under § 301 of the LMRA and exhaustion under Title I of the LMRDA is that under the latter statute, union members need not pursue internal union remedies for longer than four months before instituting legal proceedings. *See* 29 U.S.C. § 411(a)(4). This difference has no bearing on the question presented in this petition for certiorari, because it is undisputed that Casumpang's failure to appeal to the local membership occurred within four months of the suspension of his membership rights. App. 9a, 42a-43a.

[3] The Sixth Circuit case *Wagner v. General Dynamics*, 905 F.2d 126 (6th Cir. 1990) exemplifies a situation in which a courthouse door may remain open while a union member pursues available remedies. In *Wagner*, a union member prematurely and inexcusably brought suit against a union (and his employer) before exhausting internal union appeals. *Id.* at 128-29. Nevertheless, a "single remaining avenue of relief" was still procedurally available to him under the union's constitution—he could seek redress before a Public Review Board. *Id.* at 129. The Sixth Circuit therefore upheld the district court's decision to dismiss his lawsuit without prejudice so that he could pursue this remaining available remedy (and, if necessary, return to court thereafter). *Id.* Here, by contrast, Local 142's internal appeal procedures are *no longer available* to Casumpang due to his decision to bypass a timely appeal to the local membership.

correctly dismissed LMRDA Title I claim with prejudice where union member failed to participate in union's reasonable hearing procedures). Still other circuits implicitly recognize the judicial-foreclosure rule announced by the Seventh Circuit in *Stevens*. *See, e.g., Hayes v. Brotherhood of Ry. and Airline Clerks/Allied Services Div.*, 727 F.2d 1383, 1386-87 (5th Cir. 1984), *cert. denied*, 469 U.S. 935 (1984) (affirming summary judgment for union where plaintiff inexcusably failed to pursue union's internal appeals through completion); *Monroe*, 723 F.2d at 24-26 (affirming summary judgment for union where member failed to exhaust union remedies by pursuing only two out of three intraunion appeal steps); *Amalgamated Clothing Workers of America Rank and File Committee v. Amalgamated Clothing Workers of Am., Philadelphia, Joint Bd.*, 473 F.2d 1303 (3d Cir. 1973) (dismissing case where plaintiffs failed to use union's reasonable procedure for amending union's bylaws before filing suit).[4]

As these cases outside the Ninth Circuit correctly hold, a union member who has defaulted on internal union remedies should *not* get a "second bite" at the internal-procedure apple, and should *not* be able to seek further judicial review of an inexcusably-defaulted claim. *Stevens*, 20 F.3d at 733 ("To allow union members to circumvent their union's grievance-filing timetable and proceed to court unobstructed by the default would drain the exhaustion requirement of its beneficial effects. So long as the timetable is reasonable, failure to

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[4] In addition to the circuit court decisions cited herein, numerous district court decisions bar judicial relief when a plaintiff has failed to comply with a union's reasonable hearing procedures before bringing suit. *See, e.g., Local 323 v. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO*, 160 F. Supp.2d 500, 508 (W.D. N.Y. 2001); *Keiper v. United Auto. Workers' Union, Local 677*, 867 F. Supp. 298, 304-06 (E.D. Pa. 1994); *Causey v. Local 1323, United Auto., Aerospace and Agric. Implement Workers of Am., UAW*, 734 F. Supp. 1201, 1206-07 (D. S.C. 1989).

adhere to it will typically be fatal."). Otherwise, there is no incentive for a union member to pursue internal remedies *before* seeking recourse in court. One may simply do what the Ninth Circuit's decision permits: eschew or abandon internal union remedies, file a lawsuit, and take comfort in the knowledge that if the court does not excuse your failure to exhaust, the worst thing that could happen is you will be ordered to pursue internal union remedies while your lawsuit is stayed. The Ninth Circuit's opinion undermines the purposes of the exhaustion doctrine by perversely encouraging union members to bypass a union's appeals process and rush to court without affording the union an opportunity to resolve the dispute in the first instance.

Moreover, giving union members another full opportunity to pursue internal remedies (and, perhaps, return to court a second time) after they have defaulted on those remedies renders the union's reasonable procedural requirements meaningless. *See id.* A union is entitled to adopt reasonable deadlines for processing internal appeals. *See Donovan v. Local 1235, Int'l Longshoremen's Ass'n, AFL-CIO*, 715 F.2d 70, 75 (3d Cir. 1983) (unions are entitled to adopt and require adherence to reasonable dispute resolution procedures). Such deadlines provide necessary order and predictability in the dispute resolution process, and ensure that disputes will be resolved expeditiously, while memories and issues are still fresh. These important reasons for maintaining reasonable procedural requirements are frustrated by the Ninth Circuit's holding, which gives a union member an opportunity to pursue an *already-defaulted* claim through the union's appeal process after his or her lawsuit is dismissed (often months or years after the dispute initially arose).

It is also important to note that the Ninth Circuit's decision in this Title I case could adversely impact cases involving other types of claims. Because the exhaustion requirement furthers significant labor policy goals, it applies not

only to claims under Title I of the LMRDA, but also to claims brought under Title IV of the LMRDA (29 U.S.C. §§ 481-483), § 301 of the LMRA, and the union's duty of fair representation. *See, e.g., Clayton*, 451 U.S. at 682 (claims brought under § 301 and the duty of fair representation); *Hodgson*, 403 U.S. at 336 (LMRDA Title IV claim barred after union member procedurally defaulted on internal union appeals). In the Ninth Circuit, continuing administrative and judicial relief is now available to a union member who previously defaulted on his or her fair and adequate internal union appeals—and this erroneous rule arguably applies when the union member's suit arises under any of these various labor statutes.

The issue in this case impacts the institutional interests of dozens of international unions and thousands of local unions across the country that require members to follow reasonable internal hearing procedures before taking their disputes to court. All of these unions operate under a federally-regulated scheme of union self-governance that encourages them to maintain their own internal procedures for handling and resolving the disputes that inevitably arise over issues of union governance. The Ninth Circuit's *Casumpang* decision undercuts this scheme and will increase the burden on courts to resolve issues that should instead be resolved in the first instance by unions themselves.

In sum, the Ninth Circuit has treated the availability of judicial relief in the exhaustion context in an anomalous manner that conflicts with national labor policy and the correctly-reasoned decisions of its sister circuits. This Court should grant certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

HERBERT R. TAKAHASHI
REBECCA L. COVERT
TAKAHASHI, MASUI & VASCONCELLOS
547 Halekauwila Street,
Room 206
Honolulu, Hawaii 96813
(808) 526-3003

FRED H. ALTSHULER *
LAURA P. JURAN
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, California 94108
(415) 421-7151

* Counsel of Record